TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes and Rules Involved 2

Statement of the Case 2

Question No. 1 (Restated) 11

Question No. 2 (Restated) 11

Argument and Authorities 11

A. The Trial Court and the Court of Appeals Properly and Correctly Held That the Petitioner Had No Property Interest in the Continued Employment With the Karnes City Independent School District 12

B. The Trial Court and the Court of Appeals For the Fifth Circuit Properly and Correctly Held That the Petitioner Had No Liberty Interest in the Continued Employment With the Karnes City Independent School District 18

Page

C. The Petitioner Failed to Exhaust Her Available Administrative Remedies Prior to Initiation of This Action 24

Conclusion 26

Certificate of Service 28

Appendix:

Exhibit "A" A-1

Exhibit "B" A-9

Exhibit "C" A-12

Exhibit "D" A-15

Exhibit "E" A-19

Exhibit "F" A-23

Exhibit "G" A-27

Exhibit "H" A-31

Exhibit "I" A-35

Exhibit "J" A-36

Exhibit "K" A-39

Page

Exhibit "L" A-42

Exhibit "M" A-44

Exhibit "N" A-51

Exhibit "O" A-53

Exhibit "P" A-55

TABLE OF AUTHORITIES

Cases: Page

Beattie v. Roberts, 436 F. (2d) 747, 478-49 (1st Cir. 1971) 25

Blount v. Marion County School Board, 515 F. (2d) 951, 961-62 (5th Cir. 1975) 17

Birdwell v. Hazelwood School Dist., 352 F. Supp. 613, 623 (E.D. Mo. 1972) 13

Board of Regents v. Roth, 33 L. (2d) 548, 561 (1972) 14, 18, 20, 21

Calvin v. Rupp, 471 F. (2d) 1336, 1348 (8th Cir. 1973) 19

Chastain v. Mauldin, 32 S.W. (2d) 235, 237 (Tex. Civ. App. – Austin 1930, no writ) 26

Cook v. Hudson, 365 F. Supp. 855, 861 (N.D. Miss. 1973) 16

Cook County College Teachers Union Local 1600 v. Byrd, 456 F. (2d) 882, 889 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972) 12, 13, 19

Cooper v. Curry, 399 F. Supp. 372, 374 (S.D. Miss. 1975) 15, 22

County School Trustees v. Common School Dist. No. 6, 284 S.W. 306, 307 (Tex. Civ. App. – Eastland 1926, no writ) 26

TABLE OF AUTHORITIES (Continued)

Cases: Page

Doscher v. Seminol Common Consolidated School Dist., 377 F. Supp. 1166, 1170 (N.D. Tex. 1974) 15

Duke v. North Texas State University, 469 F. (2d) 829, 838 (5th Cir. 1973) 24

Eisen v. Eastman, 421 F. (2d) 560, 569 (2nd Cir. 1969); *cert. denied*, 47 L. Ed. (2d) 75 (1970) 25

Esteban v. Central Missouri State College, 415 F. (2d) 1077, 1089 (8th Cir. 1969) 12

Ferguson v. Thomas, 430 F. (2d) 852, 857 (5th Cir. 1970) 24

Freeman v. Gould Special School Dist., 405 F. (2d) 1153, 1161 (8th Cir. 1968), *cert. denied*, 396 U.S. 843 (1969) 13

Garner v. Board of Public Works, 95 L. (3d) 1317, 1323 (1951) 19

Gay v. Wheeler, 363 F. Supp. 764, 779 (S.D. Tex. 1973) 16, 25

Griffin v. Lancaster, 400 F. Supp. 421, 423 (W.D. La. 1975) 23

Hetrick v. Martin, 480 F. (2d) 705, 707-08 (6th Cir. 1973) 19

Cases: Page

Hix v. Tuluso-Midway Ind. School Dist., 490 S.W. (2d) 706, 719 (Tex. Civ. App. – Corpus Christi 1972, writ ref'd n.r.e.) 17, 23

Jeffries v. Turkeyrun Consolidated School Dist., 492 F. (2d) 3 (7th Cir. 1974) 14

Jenkyns v. Board of Education, 294 F. (2d) 260, 261 (D.C. Cir. 1951) 21

Kelly v. West Baton Rouge Parish School Board, 517 F. (2d) 194, (5th Cir. 1975) 18, 21

LaBorde v. Franklin Parish School Board, 510 F. (2d) 590 (5th Cir. 1975) 21

Lee v. Macon County Board, 43 F. (2d) 242, 243 (5th Cir. 1973) 14

Lewis v. Spencer, 468 F. (2d) 553, 557 (5th Cir. 1972) 16, 17

Lipp v. Board of Education, 470 F. (2d) 802, 805 (7th Cir. 1972) 17, 19

McCrae v. Lindale Ind. School Dist., 450 S.W. (2d) 118, 121 (Tex. Civ. App. – Tyler 1970, writ ref'd n.r.e.) 26

McCullough v. Lohn, 483 F. (2d) 34 (5th Cir. 1973) 17

Cases: Page

McDowell v. State of Texas, 465 F. (2d) 1342 (5th Cir. 1971), *aff'd, en banc*, 465 F. (2d) 1349 (1972) 23

McEnteggart v. Cataldo, 451 F. (2d) 1109, 1111 (1st Cir. 1971), *cert. denied*, 33 L. Ed. 2d 767 (1972) 20

Moore v. Knowles, 466 F. (2d) 531, 532 (5th Cir. 1972) 16

National Educ. Ass'n v. Lee County Board of Public Instruction, 467 F. (2d) 447, 452 (5th Cir. 1972) 14

Norman v. Duval County School Board, 361 F. Supp. 1167, 1175 (M.D. Fla. 1973) 23

Orr v. Trinter, 444 F. (2d) 128, 135 (6th Cir. 1971) 19

Ortwein v. Mackey, 358 F. Supp. 705, 710 (M.D. Fla. 1970) 16, 25

Patrone v. Howland Local School Board, 472 F. (2d) 159, 160 (6th Cir. 1972) 16

Perry v. Sindermann, 33 L. Ed. (2d) 570, 578 (1972) 14, 16

Cases: Page

Plains Common Consolidated School Dist. No. 1 v. Hayhurst, 120 S.W. (2d) 322 (Tex. Civ. App. – Amarillo 1938, no writ) 26

Robinson v. Jefferson County Board of Education, 458 F. (2d) 1381, 1382 (5th Cir. 1973) 22, 23

Seitz v. Clark, 524 F. (2d) 876, 879 (9th Cir. 1975) 13

Simard v. Board of Education, 473 F. (2d) 988, 994 (2nd Cir. 1973) 23

Sims v. Fox, 505 F. (2d) 857, 863 (5th Cir. 1974) 19

Skidmore v. Shamrock Ind. School Dist., 464 F. (2d) 605 (5th Cir. 1972) 15, 18

Springston v. King, 399 F. Supp. 985, 989 (W.D. Va. 1975) 22

Thompson v. Madison County Board of Education, 476 F. (2d) 676, 679 (5th Cir. 1973) 23

Van De Pate v. Boling, 379 F. Supp. 925, 929 (E.D. Tenn. 1974) 12

Waliba v. New York University, 492 F. (2d) 96, 98 (2nd Cir. 1974) 13

Cases: Page

Whitner v. Davis, 410 F. (2d) 24, 29 (9th Cir. 1969) 25

Others:

28 U.S.C. § 1332 .....3, 8

42 U.S.C. § 1983 .....3, 12, 15

Texas Education Code § 11.13(a) 25

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO.

MS. ETTA LEE KELLNER,

Petitioner,

VERSUS

KARNES CITY INDEPENDENT SCHOOL DISTRICT,
A POLITICAL SUBDIVISION OF THE STATE OF TEXAS,
ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

BRIEF OF RESPONDENTS, THE INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE KARNES CITY INDEPENDENT SCHOOL DISTRICT

TO THE HONORABLE UNITED STATES SUPREME COURT:

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit entered a judgment on October 6, 1976 affirming the Order of the United States Court for the Western District of Texas dated

February 11, 1976. The opinion of the United States Court for the Western District of Texas is attached to the petition and designated as Exhibit "A". On or about November 24, 1976, the Court of Appeals denied petitioner's motion for a rehearing.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

(1) Whether or not the Court of Appeals for the Fifth Circuit erred in affirming the summary judgment in this case based upon the fact that there was no genuine issue as to any material fact and that the respondents were entitled to a judgment as a matter of law.

(2) Whether or not the United States Court for the Western District of Texas erred in holding that there was no genuine issue as to any material fact and that these respondents were entitled to a judgment as a matter of law.

STATUTES AND RULES INVOLVED

Rule 56 of the Federal Rules of Civil Procedure, which is contained in the appendix to respondents' brief in opposition.

STATEMENT OF THE CASE

In an effort to limit the length of this brief and for purposes of clarification, the respondents, Mr. James McClane, Mr.

Marvin Witte, Mr. Alois Linhart, Mr. Hilmer Wagener and Mr. Kenneth Matthews will be referred to herein as the Board Members. The petitioner will be referred to as either the petitioner or the plaintiff.

The petitioner asserted this action based upon 28 U.S.C. § 1332 wherein she attempted to allege causes of action arising under the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. The claims arose out of the dismissal of the petitioner from her position as a school teacher with the Karnes City Independent School District. She brought suit against the defendant school district, the Superintendent of Schools for the Karnes City Independent School District, Mr. M. E. Asman, the Principal of the elementary school, Mr. D. R. Luthringer, and the individual members of the Board of Trustees of the Karnes City Independent School District.

The facts, as indicated by the record on appeal, and as viewed in a light most favorable to the plaintiff, indicate that she was a school teacher employed by the District on a year-to-year basis (App. "L"). Her contract with the District for the year 1974-75 stated as follows:

> "This contract will be effective for *one* year(s) as long as you do efficient work and retain a good moral character." (App. "L").

The 1974-75 contract was accepted by the plaintiff (App. "M"), reflecting that she had knowledge of the provisions in the contract. It is undisputed that Ms. Kellner was familiar with the contents of her teaching contract.

Each school teacher annually employed by the Karnes City Independent School District is subjected each year to an evaluation in order to determine whether or not such employee is

"doing efficient work" pursuant to the standards contained in the particular teaching contract. In the year of 1973-74, the petitioner never rated "superior" on any category evaluated, and merely rated "acceptable" on most categories (App. "J"), which was deemed by the School District to not constitute a good evaluation and was "among the lowest of any faculty member *retained* on the staff" (App. "J"). Her excuse for these infirmities was that "room No. 9 is not adiquat (sic) for teaching Art". (App. "J").

The petitioner was again evaluated by the District in 1974-75, and a serious decline was indicated since she needed improvement in six categories, and scored "commendable" only in areas such as economic use of school supplies and dress and grooming (App. "K"). Her excuse for this deteriorated performance in the classroom was solely that her grade book was a subject of "faulty" construction (App. "K").

The petitioner clearly recognized her need for improvement in areas such as good judgment, effective use of class time, effective class management, maintenance of a school room conducive to the learning process and staff relations, and nevertheless took no action to remedy these problem areas. She even admitted that she was not accurate and prompt in her attention to records and reports, although she attributed this to the "faulty construction" of the grade book (App. "K").

As a response to the poor and adequate showing by Ms. Kellner, superintendent Asman authored a letter dated March 13, 1975 in which it was stated as follows:

> "In 1974-75, your yearly evaluation indicated that out of 37 items you rated commendable on 12 and acceptable on 25. This was among the *lowest rating* of any faculty member *retained* on the staff. This year your rating on the same 37 items indicates 5 commendable items, 26 acceptable items and 6 needed improvement items, *quite a deterioration compared with the previous evaluation which was not good to begin with.*" (Emphasis added) (App. "I").

In the Board meeting of the same date, the reemployment of Ms. Kellner was not recommended on the grounds that (1) she used poor judgment, (2) poorly managed her classes, (3) did not relate to other staff members, and (4) her records and reports were inaccurate (App. "D", "E", "F", "G" and "H"). These were some of the very same matters that had been presented to the petitioner as needing improvement on January 10, 1975 pursuant to the evaluation for the 1974-75 school year (App. "K"), and of which she had notice as of that date, as is reflected by her signature on said document (App. "K").

The Board determined that it would hold the question of non-renewal of the contract in abeyance until a later date and Ms. Kellner requested and received a hearing on the issues on April 7, 1975. At said hearing she was represented by counsel and was allowed to present witnesses in her behalf and at that time she was informed by the Board that it would give the matter careful consideration and would render a decision on the same during the May, 1975 meeting of the Board. In addition, Ms. Kellner was invited to further discuss the matters with Messrs. Asman and Luthringer, which she declined to do.

On or about May 12, 1975, the Board again met, and in emphasizing that consideration was being made regarding the benefit and welfare of the children of the school as a whole, concluded that the contract of Ms. Kellner would not be renewed for the forthcoming school year. On the same occasion it was determined that the teaching contract of one other teacher formerly employed by the Karnes City Independent School District would not be renewed for the forth-coming year. Although two of the Board members, Messrs. Witte and

Linhart, abstained from this vote, they were named as defendants in this action by the petitioner.

It is undisputed that the Board Members were acting in the performance of their official duties as members of the School Board, and determined not to renew the contract of the petitioner in good faith, without any arbitrary action on behalf of any individual (App. "D", "E", "F", "G", and "H"). Each Board member believed that such non-renewal would be in the best interest of the Karnes City Independent School District and the students presently enrolled and to be enrolled in the future, and there was not present any improper motivation or malicious action by any of the Board members (App. "D", "E", "F", "G", and "H").

Mr. James McClane, as President of the Board of Trustees of the Karnes City Independent School District, sent Ms. Kellner a letter on or about July 25, 1975, notifying her once again of the reasons for the non-renewal of her teaching contract for the 1975-76 school year, which were stated as follows:

(1) The plaintiff, Mrs. Etta Lee Kellner, exercised poor judgment in her capacity as a teacher in the following respects:

(a) She exhibited hostility toward students.

(b) She used unnecessary force in the administration of corporal punishment.

(c) She violated administrative directives by frequently leaving the school campus during her conference period.

(2) She exhibited poor classroom management in the following respects:

(a) She maintained poor classroom discipline.

(b) She failed to prepare her lesson plans either for herself or substitute teachers.

(c) She violated administrative directives by leaving the classroom unsupervised and by leaving the class room frequently during normal class time.

(3) She failed to maintain her grade book properly and to record the grades on the report cards accurately.

(4) She failed to perform her teaching duties in a manner which would meet the accepted standard conduct for the profession as recognized and applied in similarly situated school districts throughout the State of Texas. (App. "B").

In this correspondence Ms. Kellner was offered a further hearing concerning the decision of the District to not offer her a contract for the 1975-76 school year, and the names of certain individuals that would probably testify at such hearing were listed in said correspondence (App. "B"). Ms. Kellner was requested to advise the Board of Trustees if she desired such a hearing within fifteen (15) days from receipt of said letter (App. "B"). The petitioner, however, failed to so respond and instead filed this action on August 4, 1975, and has at no time responded to the generous offer of the School Board and attempted to exhaust her available administrative remedies.

The contract of the petitioner was not renewed by the Karnes City Independent School District for good and sufficient cause and she received notice of such grounds and was given the opportunity to present evidence prior to the determination to not renew the contract. In addition, she was allowed every

opportunity to be fully advised of the good cause and justifiable grounds upon which the decision was predicated.

The defendant individual members of the Board of Trustees moved to dismiss this action on the grounds that they were not subject to individual liability regarding the petitioner's claims for damages, that the petitioner had failed to exhaust her available administrative remedies, that she had no protectable property interest in the future employment with the District and was not entitled to due process; that she had no liberty interest in continued employment with the School District and had thus not stated a claim upon which relief could be granted, and because she had failed to allege the jurisdictional facts necessary to confer jurisdiction in the Federal District Court pursuant to 28 U.S.C. § 1332.

On or about November 14, 1975, the United States Court for the Western District of Texas converted the motion to dismiss as a motion for summary judgment, and ordered all parties to submit to the Court *any* evidence they desired the Court to consider in ruling upon the defendant's motion for summary judgment (App. "C"), which all litigants did subsequent to said Order. At no time did the petitioner assert that there was any genuine issue as to any material fact involved in this litigation, or that the respondents were not entitled to a judgment as a matter of law. Petitioner did submit evidence in opposition to the respondent's motion for a summary judgment; and the Court reviewed and carefully considered the briefs, exhibits and pleadings, together with a complete record and file of this action, and concluded that the motion for summary judgment was meritorious and should be granted. (App. "M"). The District Court correctly found that the petitioner conceded that the contract she accepted clearly demonstrated that "she had no formal tenure such as would entitle her to continued employment in the absence of sufficient cause" (App. "M"), and further she had failed to allege that

she had ever been denied a hearing informing her of the grounds for non-retention, or that she even desired such a hearing (App. "M"). The Trial Court concluded that the petitioner had demanded immediate reinstatement, relief which the Court could not grant, and that thus the petitioner had failed to state a claim upon which relief could be granted (App. "M"). The Court further noted that petitioner had "failed to accept an offer of the Board for a further hearing with regard to the non-renewal of her contract" (App. "M"). It was also held that the only evidence presented by petitioner regarding the denial of an alleged liberty interest were some of the reasons set forth by the School District for their decision to not renew the petitioner's contract, to-wit: "poor judgment" and "poor class management", which the Court held to be "no more injurious to the plaintiff's reputation than the fact of non-renewal itself" and which constituted "direct indications that the Board's decision not to renew the contract was based on good cause and not malevolence or caprice" (App. "M"). The Court concluded as follows:

> "The veracity of the Board's reasoning has not been questioned by the plaintiff or in any way brought into issue in this case and on the face of the allegations alone, the Court finds that good cause does exist for not renewing the plaintiff's contract". (App. "M").

It was held that the petitioner had alleged *no facts* or causes of action under the First Amendment, and the Court granted judgment in favor of these respondents. Petitioner initiated an appeal to the Court of Appeals for the Fifth Circuit, and said appellate court affirmed the summary judgment in favor of these respondents on or about October 6, 1976, and thereafter denied petitioner's motion for rehearing on or about November 24, 1976.

Of the "facts" set forth in the petitioner's petition for a writ of certiorari to this Court, the only fact that is supported by the record on appeal is that the petitioner was employed by the Karnes City Independent School District. The other "facts", such as the petitioner's trips to Thailand, Japanese Tea Parties, headaches, and the wasting of Elmer's Glue are entirely *dehors* of the record on appeal. In fact, the entire contents of pages 3, 4, 5, 6 and 7 of the petitioner's petition for a writ of certiorari before this Court constitute self-serving statements, opinions and hearsay that were not before the Trial Court although the petitioner was allowed every opportunity to submit any evidence in her possession for consideration by the Trial Court. In regard to the unverified statements set forth in the Board hearing of May 12, 1975, this information was specifically excluded by the Trial Court when the petitioner attempted to submit the same to the Court *subsequent* to the entry of a summary judgment on behalf of the respondents. Clearly, the petitioner had every opportunity to submit such evidence to the Trial Court and failed to do so and hence waived the right to submit such evidence.

The factual history of the instant litigation leads to the singular conclusion that teachers may be re-elected by the Karnes City Independent School District, and that some teachers are not retained; that the petitioner had no tenure in continued employment with the school district and had no property or liberty interest to be protected in the continued employment with the District, although she received the full benefits of due process though disinterested in the same. She further had no cause of action or claim against the individual members of the Board of Trustees of the Karnes City Independent School District. The judgment entered by the Trial Court on February 11, 1976 and which was affirmed by the United States Court of Appeals for the Fifth Circuit on or about October 6, 1976 was in all things correct and proper, and it is respectfully submitted that this Court should affirm said judgment.

QUESTION NO. 1 (RESTATED)

Whether or not the Court of Appeals for the Fifth Circuit erred in affirming the summary judgment in this case based upon the fact that there was no genuine issue as to any material fact and that the respondents were entitled to a judgment as a matter of law.

QUESTION NO. 2 (RESTATED)

Whether or not the United States Court for the Western District of Texas erred in holding that there was no genuine issue as to any material fact and that these respondents were entitled to a judgment as a matter of law.

ARGUMENT AND AUTHORITIES

(Argument on the above questions is hereby consolidated for purposes of argument since the questions are germane to one another and separate argument on each would unnecessarily lengthen this opposition brief.)

Since the only issue presented by the petitioner in her application for a writ of certiorari is whether or not she has stated a prima facie case of the denial of alleged "property" and "liberty" interests, respondents' arguments in support of their position that they are not individually liable in regard to the decision to not renew the contract of the petitioner will be dispensed with for purposes of this brief.

A. THE TRIAL COURT AND THE COURT OF APPEALS PROPERLY AND CORRECTLY HELD THAT THE PETITIONER HAD NO PROPERTY INTEREST IN THE CONTINUED EMPLOYMENT WITH THE KARNES CITY INDEPENDENT SCHOOL DISTRICT.

The petitioner alleges that she had a protectable property interest in her employment with the respondent school district and that the decision to not renew her one-year contract was violative of procedural due process according to her allegations that she was not afforded a notice and a hearing setting forth the reasons for non-renewal. Since the petitioner was a non-tenured teacher with no expectancy of continued employment with the District, she was of course not entitled to notice and a hearing in regard to any determination not to renew her contract. Further, the petitioner failed to sustain her burden of establishing a prima facie case of discrimination pursuant to 42 U.S.C. § 1983. *Van De Pate v. Boling*, 379 F. Supp. 925, 929 (E.D. Tenn. 1974). The record on appeal clearly indicates that Ms. Kellner was not a tenured employee of the Karnes City Independent School District, as is clearly reflected by the contract between her and the District, and the non-retention of other teachers by the School District. Nevertheless, she was afforded two hearings regarding the non-renewal of her teaching contract and was informed of the reasons for such non-renewal, and she was also offered an additional hearing which she declined to accept and was given further notice regarding the reasons for the decision to not renew her contract.

It is well established that the school district has considerable latitude and discretion in its formulation of rules and regulations governing the school policies, *Esteban v. Central Missouri State College*, 415 F. 2d 1077, 1089 (8th Cir. 1969), and that a school administration may validly decline to renew the contract of a teacher where the decision is based wholly upon the performance of the teacher. *Cook County College Teachers*

Union Local 1600 v. Byrd, 456 F. (2d) 882, 889 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972). As stated by the Court of Appeals for the Eighth Circuit,

> "School boards are representatives of the people and should have wide latitude and discretion in the operation of a school district, including employment and rehiring practices. Local autonomy must be maintained to allow continued democratic control over the education as a primary state function . . ."

Freeman v. Gould Special School Dist., 405 F. (2d) 1153, 1161 (8th Cir. 1968), *cert. denied*, 396 U.S. 843 (1969). The respondents in this litigation have had full authority to establish the hiring and employment practices of the school district, and it is obvious, pursuant to the clear and unambiguous language of the contractual agreement entered into by the district and the petitioner for the school year of 1974-75, that there was no tenure or expectancy for reemployment beyond that period, and unequivocally no more than a unilateral or subjective expectation on the part of the petitioner for continued employment with the school district. The terms of the contract between the petitioner and the district expressly state as follows:

> "(T)his contract will be effective for one (1) year(s) as long as you do efficient work and retain a good moral character."

The authorities are in accord that the required form that any procedural due process is to take in any given case must be accommodated to the facts of each case, *Birdwell v. Hazelwood School Dist.*, 352 F. Supp. 613, 623 (E.D. Mo. 1972), and that a non-tenured teacher only has the right to due process if he can show a deprivation of a liberty or a property. *Seitz v. Clark*, 524 F. (2d) 876, 879 (9th Cir. 1975); *Waliba v. New York University*, 492 F. (2d) 96, 98 (2nd Cir. 1974).

It is clear that the petitioner did not have a property interest in the continued employment with the Karnes City Independent School District. The contractual agreement between the petitioner and the district dated March 18, 1974, clearly put her on notice of this fact, and, as stated by the United States Supreme Court, where a non-tenured teacher is employed on a one-year contract, and is not reemployed the succeeding year, he has an abstract concern in being rehired, but he has no property interest to require a hearing upon declination of the authorities to renew his contract of employment. *Board of Regents v. Roth*, 33 L. (2d) 548, 561 (1972).

Further, the United States Supreme Court has also enunciated the standard that the United States Constitution does not require an opportunity for a hearing before the non-renewal of a non-tenured state teacher's contract, *Perry v. Sindermann*, 33 L. Ed. (2d) 570, 578 (1972). The Court further held in *Perry* that a mere subjective expectancy is not an interest in property protected by procedural due process. *Id.* at 580. It is the prevailing standard that a teacher may be discharged for unspecified reasons without notice or hearing where there is no tenure or an objective expectancy of reemployment, *National Educ. Ass'n v. Lee County Board of Public Instruction*, 467 F. (2d) 447, 452 (5th Cir. 1972), and thus the petitioner herein was entitled to neither notice nor a hearing in connection with the expiration of her contract. *Jeffries v. Turkeyrun Consolidated School Dist.*, 492 F. (2d) 3 (7th Cir. 1974); *Lee v. Macon County Board*, 43 F. (2d) 242, 243 (5th Cir. 1973).

In a case where the plaintiff alleged a deprivation of her property interest and the teaching contract of the plaintiff was to be renewed depending upon his compliance with school policies and regulations, and the record on appeal was silent as to any school policy, regulation or promise on the part of the school officials that the teacher would as "a matter of course" be accepted for future employment, it was held that

the teacher had no property right in his employment. *Cooper v. Curry*, 399 F. Supp. 372, 374 (S.D. Miss. 1975).

The Court in *Skidmore v. Shamrock Ind. School Dist.*, 464 F. (2d) 605 (5th Cir. 1972) encountered a case in which a teacher asserted a cause of action alleging abridgement of her professional and substantive due process rights in the non-renewal of her employment. In this case, the plaintiff had been employed as a classroom instructor by the defendant school district for twenty-two consecutive one-year terms, and she was not offered a renewal of her contract on the 23rd year. The Court of Appeals for the Fifth Circuit concluded that the plaintiff was a non-tenured teacher and that she had no more than an "expectancy" that her contract would be renewed. *Id.* at 606. In the *Skidmore* case, the Court placed considerable emphasis on the tenure policies of the school district, and concluded that because the plaintiff had no tenure and no more than a mere expectancy of re-employment, the decision not to rehire her without notice and a hearing did not deprive her of due process. *Id.* at 606.

In another case where the plaintiff teacher had been continuously employed by the school district for twenty consecutive years on one-year contracts, the United States Court for the Northern District of Texas concluded that the mere subjective expectancy of re-employment is insufficient to require that a hearing meeting due process requirements be afforded the teacher prior to the termination of her employment. *Doscher v. Seminol Common Consolidated School Dist.*, 377 F. Supp. 1166, 1170 (N.D. Tex. 1974). In *Doscher* the plaintiff had not received a hearing in which he was advised of any grounds for her dismissal, but the Court concluded that she had no property interest or liberty interest so as to entitle her to due process and that she had no tenure and no right to renewal of her contract, even though she had alleged causes of action falling from 42 U.S.C. § 1983, as well as the First and Four-

teenth Amendments, as in the present action. In *Moore v. Knowles*, 466 F. (2d) 531, 532 (5th Cir. 1972), the Court faced an assertion by a teacher that while he lacked tenure, he had the expectancy of tenure. The Court, however, determined that a mere expectancy of employment does not necessitate a hearing, *Id.* at 532, and concluded that due process requirements are not violated by the removal of a teacher from the classroom without a hearing. *Id.* at 532.

The Courts have often reiterated the standard that a mere "subjective" expectancy, *Cook v. Hudson*, 365 F. Supp. 855, 861 (N.D. Miss. 1973), or a "unilateral" expectancy, *Gay v. Wheeler*, 363 F. Supp. 764, 779 (S.D. Tex. 1973), is an insufficient ground for there to be a notice and a hearing prior to non-renewal of the teacher's contract, and the mere employment by the district of the teacher for a number of years creates no more than a "subjective" expectancy of re-employment. Further, it has been held that the mere employment of one-year contracts over multi-year periods is insufficient to create an expectancy of continued employment, *Patrone v. Howland Local School Board*, 472 F. (2d) 159, 160 (6th Cir. 1972), and that there must be more than a unilateral expectation. *Ortwein v. Mackey*, 358 F. Supp. 705, 710 (M.D. Fla. 1970). As stated by the Court of Appeals for the Fifth Circuit in *Sindermann v. Perry*, *supra*, a contrary result will legally deny to the school the freedom to employ personnel under annual contracts which are unfettered by any re-employment obligations. *Id.* at 944. The Court concluded that if a contrary result was promulgated "every teacher would thus be granted substantial tenure rights by Court edict." *Id.* at 944.

The Court concluded that the Courts do not make contracts for teachers, *Sindermann*, *supra* at page 944, and reiterated the rule that a teacher without tenure or an expectancy of re-employment may have his contract terminated upon any reason or no reason at all. *Id.* at 944; *Lewis v. Spencer*, 468 F.

(2d) 553, 557 (5th Cir. 1972). In addition, the courts have determined that the fact that a teacher has been rehired each year for a number of years does not constitute any evidence that a school district impliedly contracted with the teacher to renew the contract annually, *Hix v. Tuluso-Midway Ind. School Dist.*, 490 S.W. (2d) 706, 719 (Tex. Civ. App. – Corpus Christi 1972, writ ref'd n.r.e.).

The concept of property as related to public employment is usually defined in terms of a legitimate claim of entitlement to a job, *Lipp v. Board of Education*, 470 F. (2d) 802, 805 (7th Cir. 1972), and procedural due process does not apply to cases of non-employment of teachers unless a teacher has a property interest on a constitutionally cognizable liberty. *McCullough v. Lohn*, 483 F. (2d) 34 (5th Cir. 1973).

In this case there was no defect in procedural or substantive due process; if, however, there was any question in this regard, the same was cured by the offer of a hearing and a notice of the charges conveyed to Ms. Kellner by the Superintendent of Schools by letter dated July 25, 1975. *Blount v. Marion County School Board*, 515 F. (2d) 951, 961 - 62 (5th Cir. 1975). The record on appeal unequivocally demonstrates that the petitioner was a non-tenured teacher with, at the most, a unilateral expectancy of re-employment with the School District. She was placed on notice that the contractual agreement was for one (1) year only and it was not implied by the contractual agreement that the school district would rehire her on each succeeding year. The mere use of the one-year contract indicates the policy of the school district, and it cannot therefore be said that the petitioner had a property interest in continued employment so as to entitle her to a notice and a hearing prior to the decision not to renew her contract. Petitioner merely alleged a mere expectancy of the continued employment generated by previous periods of employment which is held to constitute a failure to state a claim upon which relief can be granted.

Skidmore, supra. It is abundantly clear that the petitioner failed to state a claim or a cause of action upon which relief could be granted and that the District Court properly and correctly determined that the petitioner had no property interest in continued employment with the School District, and that there was no genuine issue as to any material fact and that these respondents were entitled to a judgment as a matter of law.

B. THE TRIAL COURT AND THE COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY AND CORRECTLY HELD THAT THE PETITIONER HAD NO LIBERTY INTEREST IN THE CONTINUED EMPLOYMENT WITH THE KARNES CITY INDEPENDENT SCHOOL DISTRICT.

Petitioner contended that she had acquired a liberty interest to her professional reputation protectable under the First and Fourteenth Amendments to the United States Constitution, and that she was denied such interest in violation of her rights and constitutionally impermissible reasons. Petitioner did not acquire a liberty interest in her continued employment with the Karnes City Independent School District, and, *arguendo*, even if such liberty interest did flow to the benefit of the petitioner, there has been no abridgement thereof by these respondents.

The United States Supreme Court has concluded that the concept of due process is extended too far when it is suggested that a person is deprived of a "liberty" when he is simply not rehired for one job, but remains as free as before to seek another position in other employment. *Board of Regents v. Roth*, 38 L. Ed. (2d) 548, 560 (1972). In *Kelly v. West Baton Rouge Parish School Board*, 517 F. (2d) 194, (5th Cir. 1975), the Court of Appeals for the Fifth Circuit determined as follows:

> "The mere fact that non-retention by a school system might make a teacher less attractive to other school systems does not constitute deprivation of liberty so as to entitle the teacher to a pre-termination hearing." *Id.* at 199.

Additionally, it has been held that not every negative effect on one's attractiveness to future employers violates due process if it results without a hearing. *Lipp v. Board of Education*, 470 F. (2d) 808, 815 (7th Cir. 1972). Moreover, even if non-retention by a school district makes a teacher less desirable to other school districts, this does not constitute a deprivation of her liberty so as to entitle the teacher to a hearing, *Calvin v. Rupp*, 471 F. (2d) 1336, 1348 (8th Cir. 1973). The Court of Appeals for the Fifth Circuit has thus concluded that the mere presence of derogatory information in an employer's file does not infringe upon a protected liberty, *Sims v. Fox*, 505 F. 2d 857, 863 (5th Cir. 1974).

It is well settled that it is the perogative of the school district as an employer to determine whether a teacher's contract of employment should be renewed since the quality of the teacher is the primary consideration. *Orr v. Trinter*, 444 F. (2d) 128, 135 (6th Cir. 1971). Of course, the state has an interest in inquiring into the fitness and suitability of its employees for public services, *Garner v. Board of Public Works*, 95 L. (3d) 1317, 1323 (1951), and the school administration must therefore have the right, as well as the duty, to evaluate the performance of a teacher in the classroom in order to determine whether that performance is satisfactory. *Hetrick v. Martin*, 480 F. (2d) 705, 707-08 (6th Cir. 1973). A school administration may therefore validly decline to renew a teacher's contract where the decision is grounded upon the performance of a teacher, *Cook County Teacher's Union Local 1600 v. Byrd, supra*, and where the policies or actions of a school administration appear to be valid, the burden is upon the teacher to show that the actions

or policies are unrelated to either educational processes or working relationships. *McEnteggart v. Cataldo*, 451 F. (2d) 1109, 1111 (1st Cir. 1971), *cert. denied*, 33 L. Ed. (2d) 767 (1972). It is thus obvious that the termination or non-retention of personnel is inherently vested in the local school boards.

The concept of a "liberty interest" falls within the ambit of the 14th Amendment's protection from deprivation of "life, liberty or property". As previously stated, continued public employment is not a privilege to which constitutional rights attach. In *Board of Regents v. Roth, supra*, the Court dealt with the issue of a liberty interest in a case in which the plaintiff teacher alleged a denial of a "liberty" interest because the non-renewal of his contract would have had an adverse result on his opportunities for future employment. In rejecting this argument, the Court stated that a "liberty" extends to the following:

> "(T)he right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long-recognized . . . . as essential to the orderly pursuit of happiness by free men." *Id.* at 558.

The *Roth* Court refused to find that non-renewal of the plaintiff's contract with the School District deprived him of liberty or due process, and illustrated two situations in which the school districty could deny a "liberty" to a teacher, to-wit: (1) In those cases where the non-retention foreclosed the opportunity of a teacher to take advantage of future employment, *Id.* at 559, and in those cases where the good name, reputation, honor or integrity of the teacher is at stake, such as in the assertion of criminal charges, *Id.* at 558, or the assertion of immorality. *Jenkyns v. Board of Education*, 294 F. (2d) 260, 261 (D.C. Cir. 1951). Even under these circumstances, however, the school district may continue to refuse to rehire a teacher even if he vindicates his name. *Board of Regents v. Roth, supra.*

In *Kelly v. Baton Rouge Parish School Board*, 517 F. (2d) 194 (5th Cir. 1975), it was held that the mere fact that non-retention by a school system might make a teacher less attractive to other school systems does not constitute deprivation of a liberty interest. In *LaBorde v. Franklin Parish School Board*, 510 F. (2d) 590 (5th Cir. 1975), the plaintiff teacher sought relief for alleged violations of her purported liberty interest. The grounds set forth by the school district for the non-retention of the plaintiff included the following:

(1) Use of language unbecoming a teacher in the classroom.

(2) Refusal or inability to carry out directive instructions of the principal and the superintendent.

(3) Reporting late for the beginning of the school day.

(4) Unsatisfactory control of students within her classes.

(5) Uncooperative attitude toward the principal of the school.

(6) Improper supervision and planning for FHA elections.

(7) Use of harsh discipline against girls in the junior high school. *Id.* at 592.

The plaintiff contended that the termination damaged her reputation and good name and foreclosed other employment opportunities. The United States District Court granted the

defendant's motion for summary judgment, and the Court of Appeals for the Fifth Circuit affirmed, and in so doing stated the following settled standard:

> "The underlying and uncontroverted facts disclosed that the school board did not make any charge against Mrs. LaBorde of a nature calculated to damage her standing or reputation in the community. No 'liberty' right she possessed was infringed. She was not charged with dishonesty or immorality, nor did the school board impose on her any stigma or disability that foreclosed her freedom to take advantage of other employment opportunities . . . (T)he reasons which the school board gave her for terminating her contract were no more than the reflection of dissatisfaction with her teaching methods and classroom conduct. None of the charges were made public by school officials. Their mention in the local paper that her contract had not been renewed did not impugn Mrs. LaBorde's good name, honor or integrity. Under Roth's standards, her liberty claim was properly denied." *Id.* at 593.

The Court concluded that summary judgments are proper in such factual situations. In the instant case, there is no evidence of any local newspapers publicizing the non-retention of Ms. Kellner. It has further been held that even if the fact of non-retention might effect the ability of the teacher to find other work, such does not constitute a deprivation of a "liberty" within the meaning of the due process clause. *Robinson v. Jefferson County Board of Education*, 458 F. (2d) 1381, 1382 (5th Cir. 1973). The summary judgment was clearly mandated under the facts before the trial court, *Cooper v. Curry*, 399 F. Supp. 373, 374 (S.D. Miss. 1975); *Springston v. King*, 399 F. Supp. 985, 989 (W.D. Va. 1975). There is no summary judgment evidence reflecting that the grounds for non-retention

set forth in this action in any way advocated that Ms. Kellner was either dishonest or immoral, nor is there any evidence that such was publicized. *Griffin v. Lancaster*, 400 F. Supp. 421, 423 (W.D. La. 1975). The petitioner has done nothing more than allege a broad and unsubstantiated assertion that she was deprived of some liberty right. There was no contention that the school district's refusal for rehiring her foreclosed the possibility of future alternative employment, and the record on appeal is totally devoid of any contention that the petitioner has even sought alternative employment. Moreover, it was not contended that the non-renewal of the petitioner's contract placed a serious blight on her name. She stated in her original complaint that her contract was not renewed on the grounds of "poor judgment" and "poor class management," neither of which would result in the placement of such a blight on her name, all of which she criticizes as being "vague and ambiguous". The Court of Appeals for the Fifth Circuit has upheld as valid grounds for non-renewal of teacher contracts inefficiency, incompetency and insubordination, *McDowell v. State of Texas*, 465 F. (2d) 1342 (5th Cir. 1971), *aff'd, en banc*, 465 F. (2d) 1349 (1972); *Norman v. Duval County School Board*, 361 F. Supp. 1167, 1175 (M.D. Fla. 1973); *Robinson v. Jefferson County Board of Education*, 485 F. (2d) 1381, 1382 (5th Cir. 1973). Certainly poor performance in the classroom and neglect of duties may be grounds to decline or to rehire a teacher, *Thompson v. Madison County Board of Education*, 476 F. (2d) 676, 679 (5th Cir. 1973), as is the failure to render satisfactory service, *Hix v. Toluso, supra*, and the refusal to comply with the administrative obligations. *Simard v. Board of Education*, 473 F. (2d) 988, 994 (2nd Cir. 1973). Although the record on appeal reflects that there were more reasons than those of "poor judgment" and "poor class management", it is clear that these grounds are sufficient upon which to predicate a non-renewal of teaching contract and did constitute notice under the law.

The petitioner failed to allege a claim or cause of action under any alleged "liberty" interest or denial of substantive due process, and thus failed to state a claim upon which relief could be granted. There is no genuine issue as to any material fact in this regard and the respondents were entitled to a judgment as a matter of law.

C. THE PETITIONER FAILED TO EXHAUST HER AVAILABLE ADMINISTRATIVE REMEDIES PRIOR TO INITIATION OF THIS ACTION.

The Courts are reluctant to exercise jurisdiction over cases involving non-renewal of teacher contracts until a teacher has exhausted her administrative remedies. It is a firmly established doctrine that a classroom instructor has no right to continued public employment, *Ferguson v. Thomas*, 430 F. (2d) 852, 857 (5th Cir. 1970). In *Ferguson, supra*, the Court of Appeals cautioned against court procedures which allow the full development of cases involving non-renewal of the teacher contract on the ground that such development constitutes an intrusion into the internal affairs of state educational institutions as well as placing an unwise burden on the judicial administration of the courts. It has also been stated that if "the instructor" challenges his termination on grounds that his constitutional rights have been infringed, a decision of that claim may and should be avoided if valid non-discriminatory grounds are shown to have been the basis for the institution's action. *Id.* at 859. It has also been stated that the Courts are not equipped for either training or experienced to select the faculty and staff for a hearing on the dismissal of a teacher and the Court should only interfere where there is a *clear* case of constitutional infringement, *Duke v. North Texas State University*, 469 F. (2d) 829, 838 (5th Cir. 1973). It is not the function of the Federal District Courts to pass upon the wisdom of a hearing regarding the continued employment of the school

faculty member, *Ortwein v. Mackey, supra.* In addition, the United States Court for the Southern District of Texas enunciated the following standard:

> "This Court is firmly of the opinion that a school board should be entirely unfettered to discharge any teacher without tenure which it considers to be unfit to teach." *Gay v. Wheeler, supra.*

The Circuits are generally in accord that prior to seeking judicial review, the plaintiff must request and exhaust available administrative remedies. *Beattie v. Roberts*, 436 F. (2d) 747, 478-49 (1st Cir. 1971); *Eisen v. Eastman*, 421 F. (2d) 560, 569 (2nd Cir. 1969); *cert. denied*, 47 L. Ed. (2d) 75 (1970); *Whitner v. Davis*, 410 F. (2d) 24, 29 (9th Cir. 1969). The petitioner rejected offers to participate in administrative remedies since by letter dated July 25, 1975, Mr. James A. McClane the President of the Board of Trustees of the Karnes City Independent School District, offered the petitioner a hearing concerning the Board's decision to not offer her a contract for the 1975-76 school year. As concluded by the District Court and the Court of Appeals for the Fifth Circuit, petitioner failed to allege that she had ever been denied a hearing informing her of the grounds for non-retention nor did she ever allege that she desired such a hearing.

Moreover, the petitioner has made no effort whatsoever to exhaust other available administrative remedies. Section 11.13(a) of the Texas Education Code provides that if persons having a dispute arising from actions or decisions of any Board of Trustees may appeal in writing to the Commissioner of Education who shall, subsequent to due notice to all interested parties, hold a hearing and render a decision. The Courts of the State of Texas have consistently held that the persons and employees involved in disputes with school districts must exhaust all available administrative remedies and appeal to higher

school authorities prior to resorting to the Courts, and the Courts are without jurisdiction until the exhaustion of such administrative remedies. *McCrae v. Lindale Ind. School Dist.*, 450 S.W. (2d) 118, 121 (Tex. Civ. App. –Tyler 1970, writ ref'd n.r.e.). It has been held that the exhaustion of administrative remedies is a condition precedent to the jurisdiction of the Courts, *County School Trustees v. Common School Dist. No. 6*, 284 S.W. 306, 307 (Tex. Civ. App. – Eastland 1926, no writ), and the Courts must dismiss a cause of action until such administrative remedies have been exhausted. *Chastain v. Mauldin*, 32 S.W. (2d) 235, 237 (Tex. Civ. App. – Austin 1930, no writ). As stated in *Plains Common Consolidated School Dist. No. 1 v. Hayhurst*, 120 S.W. (2d) 322 (Tex. Civ. App. – Amarillo 1938, no writ),

> "It seems to be the fixed policy of the legislature to create an educational system of public free schools that is sufficient unto itself and free as far as practical from any interference by the judiciary. The Courts fully recognize the desire of the legislative branch of the state government and uniformly hold that the remedies provided for before school authorities must be exhausted before the Courts will interfere." *Id.* at 327.

In the instant case, the petitioner has made no effort whatsoever to exhaust any, much less all, of her available administrative remedies under Texas Law, nor has she even alleged such attempts.

CONCLUSION

This action is not a matter where the Court of Appeals has rendered a decision in conflict with the decisions of another circuit Court of Appeals (and no such conflict is reflected in the petition), nor have either of the Lower Courts departed from the accepted and usual course of proceedings. The petition sets forth no valid grounds supporting the granting of a writ of certiorari in this matter, and the actions of the Lower Courts are fully supported by the record on appeal and are predicated upon well-settled legal principles. For the foregoing reasons, the respondents pray that the Honorable Supreme Court of the United States deny the petitioner's writ of certiorari.

Respectfully submitted,

EDWARD P. FAHEY
J. MICHAEL MYERS

BY Edward P. Fahey

ATTORNEYS FOR RESPONDENTS,
The Individual Members of the
Board of Trustees of the Karnes
City Independent School District

OF COUNSEL:

GROCE, LOCKE & HEBDON
2000 Frost Bank Tower
San Antonio, Texas 78205

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing has been served upon Mr. Larry Watts, 5620 Greenbriar, Suite 103, Houston, Texas 77005, and to Mr. Emerson Banack, Foster, Lewis, Langley, Gardner and Banack, Frost Bank Tower, San Antonio, Texas 78205, on this the 18th day of March, 1977.

Edward P. Fahey

EXHIBIT "A"

**[1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

MS. ETTA LEE KELLNER,	)	
Plaintiff	)	
vs.	)	Civil Action No. SA 75 CA 187
KARNES CITY INDEPENDENT SCHOOL DISTRICT, a Political Subdivision of the State of Texas; MR. M. E. ASMAN, both Individually and in his Official Capacity as Superintendent of the Schools of the Karnes City Independent School District, MR. JAMES McCLANE, MRS. MARY AHRENS, MR. MARVIN WITTE, MR. ALOIS LINHART, MR. HILMER WAGENER and MR. KENNETH MATTHEWS, all both Individually and in their respective Official Capacities as Members of the Board of Trustees of the Karnes City Independent School District; MR. D.R. LUTHRINGER, both Individually and in his Official Capacity as Principal of City Elementary in the Karnes City Independent School District,	)	
Defendants.	)	

[1] [2]

ORIGINAL ANSWER OF THE DEFENDANT INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE KARNES CITY INDEPENDENT SCHOOL DISTRICT

Now come Mr. James McClane, Mrs. Mary Ahrens, Mr. Marvin Witte, Mr. Alois Linhart, Mr. Hilmer Wagener and Mr. Kenneth Matthews, and for answer to plaintiff's complaint on file herein, would respectfully show to the Court the following, to-wit:

FIRST DEFENSE

These defendants deny that this Court has jurisdiction of this cause for the reason that the complaint does not show upon its face, and it is a fact, that the plaintiff has not exhausted her administrative remedies available to her under law.

SECOND DEFENSE

These defendants say that the complaint fails to state a cause of action against these defendants and for this reason these defen- [2] dants should be discharged promptly with their costs and the complaint held for naught insofar as these defendants are concerned.

THIRD DEFENSE

I

These defendants deny that this Court has jurisdiction of this cause as alleged in Paragraph I of the complaint, but admit that the plaintiff has alleged that a cause of action is brought under Titles 28 and 42 U.S.C.A., and the Constitution of the United States. These defendants do not have personal knowledge that the actual amount in controversy exceeds $10,000.00,

[2] [3]

and therefore can neither admit nor deny the same for lack of knowledge and demand strict proof thereof. These defendants specially deny that the plaintiff has alleged a cause of action pursuant to 28 U.S.C. § 1332.

II

A. These defendants admit that so far as they know and are advised, the plaintiff is a citizen of Texas and the United States, and resides within the jurisdiction of this Court.

B. These defendants deny that Mrs. Mary Ahrens is a member of the Board of Trustees of the Karnes City Independent School District, but otherwise admit that the names, descriptions and addresses of these defendants described under Paragraph II(B) are correctly alleged by the complaint insofar as that information is and has been made known to these defendants.

III

A. (1) In response to Paragraph III(A)(1), these defendants admit that plaintiff is a female, but state that they do not have personal knowledge that said plaintiff is certified to teach in the public schools of the State of Texas.

(2) In response to Paragraph III(A)(2), these defendants do not have personal knowledge of the factual allegations set forth in said Paragraph, and can neither admit nor deny the same for want of knowledge. These defendants additionally deny that the plaintiff is a "teacher" in the general construction and usual definition of said term.

(3) In response to Paragraph III(A)(3), these defendants do not have personal knowledge of the factual allegations set forth [3] in said Paragraph, and can neither admit nor deny the same for want of knowledge. Moreover, these defendants

deny that plaintiff is a "teacher" under the general construction and usual definition of said term.

(4) In response to Paragraph III(A)(4), these defendants do not have personal knowledge of the allegations contained in said Paragraph, and therefore deny such allegations for lack of sufficient information.

(5) In response to Paragraph III(A)(5), these defendants do not have personal knowledge regarding a requested meeting with the Board of Trustees of the defendant, Karnes City Independent School District, or a meeting between the plaintiff and said Board on April 7, 1975. In addition, these defendants do not have personal knowledge that the plaintiff requested that she be given a list of reasons for non-renewal in order that she might correct any deficiencies in the performance of her duties, and therefore deny such allegations for lack of information. These defendants specially deny that the plaintiff has never been presented with areas of unsatisfactory performance.

(6) In response to Paragraph III(A)(6), these defendants do not have personal knowledge of the allegations contained in said Paragraph, and therefore deny the same for lack of knowledge.

(7) In response to Paragraph III(A)(7), these defendants specially deny that the plaintiff has at no time been apprised of any specific reasons for non-renewal. Moreover, the defendants assert that "poor judgment" and "poor class management" are neither vague nor ambiguous, and specially deny that such references are vague or ambiguous.

(8) In response to Paragraph III(A)(8), these defendants do not have sufficient knowledge regarding the allegations set forth in said Paragraph, and therefore deny the same for want of knowledge. Moreover, these defendants deny the plaintiff is

a "teacher" within the general construction and usual definition of said term.

B. (1) In regard to Paragraph III(B)(1), these defendants deny the allegations contained in said Paragraph.

[4] (2) In regard to Paragraph III(B)(2), these defendants deny the allegations contained in said Paragraph.

C. (1) In regard to Paragraph III(C)(1), these defendants deny the allegations contained in said Paragraph.

(2) In regard to Paragraph III(C)(2), these defendants specially deny the allegations contained in said Paragraph.

IV

These defendants deny any of the allegations contained in or that the plaintiff is entitled to any of the relief requested in Sub-Paragraphs A, B, C, D, E, F, and G of Paragraph IV of the complaint.

FOURTH DEFENSE

Subject to such admissions and stipulations as may be made on the trial of this case, these defendants deny the allegations contained in the complaint and demand strict proof thereof.

FIFTH DEFENSE

These defendants allege individually that each of said defendants are not individually liable to the plaintiff for any of the claims made by her in her complaint, and, insofar as each of these defendants are concerned in his individual capacity, the plaintiff's claim should be, in all things, denied. Moreover, these defendants allege individually that any action taken by them

individually was in the good faith exercise of their supervision duties.

SIXTH DEFENSE

These defendants further allege that the plaintiff herein has no legitimate claim to continued employment with the defendant, Karnes City Independent School District.

SEVENTH DEFENSE

These defendants further allege that any non-renewal of the employment contract between the plaintiff and the defendant, Karnes City Independent School District, if any, was in the best interest of said District and that the non-renewal of her contract by the District, if any, was based upon just causes.

EIGHTH DEFENSE

These defendants further allege that the plaintiff herein is and was, at the time of the alleged non-renewal of her contractual [5] agreement with the defendant school district, if any, a non-tenured employee on a year-to-year basis with the defendant district with no expectancy of a renewal contract annually, and therefore is neither entitled to continued employment with said District nor the holder of a protected property interest as might be held by a tenured employee.

NINTH DEFENSE

These defendants further allege that the plaintiff herein is and was, at the time of the alleged non-renewal of her contractual agreement with the defendant school district, a non-tenured employee on a year-to-year basis with the defendant district, and is therefore not entitled to due process.

TENTH DEFENSE

In the alternative, these defendants allege that the plaintiff herein was accorded all of the rights and benefits of due process, even though she was not so entitled, and that any hearing allowed the plaintiff was done gratuitously and is not open to judicial review.

ELEVENTH DEFENSE

These defendants rely upon the Eleventh Amendment as a defense in this cause, and assert that the nature of this action is an unlawful attempt to sue the sovereign state in violation of the Eleventh Amendment.

TWELFTH DEFENSE

These defendants allege that the common-law doctrine of immunity is a defense in this case.

THIRTEENTH DEFENSE

These defendants deny that the requested injunctive relief sought in the plaintiff's original complaint is an appropriate remedy in this cause, on the grounds that, without admitting the plaintiff has any valid cause of action under any theory of law, there is, and the plaintiff even so admits herein, that there is available a plain, adequate and complete remedy at law.

WHEREFORE, PREMISES CONSIDERED, these defendants pray that this cause be dismissed for want of jurisdiction because administrative remedies have not been exhausted; that the same be dismissed for [6] the failure to state a cause of action upon which relief can be granted against these defendants, jointly and individually; that upon final hearing hereof plaintiff be denied any relief at all in any manner, and particu-

larly take nothing against these defendants; and that these defendants go hence with their costs, and have such other relief to which they may be justly and equitably entitled.

GROCE, LOCKE & HEBDON

By _____

Damon Ball
2000 Frost Bank Tower
San Antonio, Texas 78205

ATTORNEYS FOR THE DEFENDANT INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEE OF THE KARNES CITY INDEPENDENT SCHOOL DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above foregoing Original Answer of the Defendant Individual Members of the Board of Trustees of the Karnes City Independent School District has been forwarded to Mr. Larry Watts, 5620 Greenbriar, Suite 103, Houston, Texas 77005, plaintiff's attorney of record, and to Mr. Emerson Banack, Foster, Lewis, Langley, Gardner and Banack, Frost Bank Tower, San Antonio, Texas 78205, by placing same in the United States Mail postage prepaid, on this, the _____ day of August, A.D., 1975.

_____
Damon Ball

EXHIBIT "B"

Karnes City Independent School District
M. E. Asman, Superintendent
P. O. Box 38 - 780-2321
Karnes City, Texas 78118

July 25, 1975

Mrs. Etta L. Kellner
P. O. Box 396
Karnes City, Texas 78118

Dear Mrs. Kellner:

The Board of Trustees of the Karnes City Independent School District at an emergency meeting held on July 25, 1975, voted unanimously to offer you a hearing concerning the prior decision of the Board not to offer you a contract for the school year 1975-76. Such hearing shall be public unless you request it to be closed. At such hearing you may be represented by an attorney of your choice. You or your attorney may cross-examine witnesses presented on behalf of the school district and may present such evidence as you deem beneficial to the School Board. A court reporter may transcribe the hearing and you may procure a copy of the transcript at your expense.

You are hereby notified that the reasons for the non-renewal of your contract are as follows:

1. You exercised poor judgment in your capacity as a teacher in the following respects:
   a. You have exhibited hostility to students.
   b. You have used unnecessary force in administration of corporal punishment.

c. You have violated administrative directive by frequently leaving the school campus during your conference period.

2. You have exhibited poor classroom management in the following respects:
   a. Maintain poor classroom discipline.
   b. Failed to prepare lesson plans either for yourself or substitute teacher.
   c. You have violated administrative directive by leaving classroom unsupervised and by leaving classroom frequently during normal class time.
3. You failed to maintain grade book properly and record grades on report cards accurately.
4. You failed to perform teaching duties in a manner which would meet the accepted standard of conduct for the profession as recognized and applied in similarly situated school districts throughout Texas.

It is anticipated that the following individuals will testify at the hearing concerning the above charges:

M. E. Asman	D. R. Luthringer	Roger Sides
J. L. Harris	Muriel Hartman	Laquita Gibbens
Ralph Jentsch	Mr. & Mrs. Edward Janek	

Please advise the Board, in writing, within 15 days from receipt of this letter if you desire to have a hearing concerning the Board's decision not to offer you a contract for 1975-76 school year. It is the School Board's desire to extend to you and fully protect all constitutional due process rights which you may possess.

By copy of this letter we are notifying your attorney, Mr. Larry Watts, of your right to request a hearing. Mr. Watts may communicate with the attorney for the School Board, Emerson

Banack, Jr. 1655 Frost Bank Tower San Antonio, Texas 78205, A/C 512-226-3116, concerning a time and date for a hearing if you so desire.

Yours truly,

/s/ James A. McClane

James A. McClane
President Board of Trustees
Karnes City Ind. School Dist.

cc: Larry Watts

[1] [1]

EXHIBIT "C"

[1] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ETTA LEE KELLNER	)	
	)	
V.	)	SA-75-CA-187
	)	
KARNES CITY INDEPENDENT	)	
SCHOOL DISTRICT, ET AL.	)	

ORDER

FILED: November 14, 1975

On this . 14th day of November, 1975, came on to be considered the Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted filed by the defendants in the above styled and numbered cause pursuant to Rule 12 (b) (6), Federal Rules of Civil Procedure. Attached to the Motion of the defendants are two Exhibits: the most recent contract between the defendant School District and the plaintiff and a letter from the President of the Board of Trustees to the plaintiff offering her an administrative hearing and outlining the basis for the decision not to renew the plaintiff's contract. Normally, of course, a Rule 12 (b) (6) motion is a challenge to the sufficiency of the plaintiff's pleadings and such evidence outside the pleadings is not considered. Rule 12, however, empowers the Court, in its discretion, to consider such evidence and in the event this is done to convert the motion into a plea for Summary Judgment:

[1] [2]

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for Summary Judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

See also Wright & Miller, Federal Practice & Procedure: Civil Sections 1364 and 1366.

Having considered the Exhibits attached to the defendants' motion, the Court concludes that they are of probative value [2] and should be considered. This being the case, the Motion to Dismiss automatically becomes a Motion for Summary Judgment which shall be adjudicated in compliance with Rule 56, Federal Rules of Civil Procedure. "A Motion to Dismiss for failing to state a claim upon which relief can be granted must be treated as a Motion for Summary Judgment if matters outside the pleadings are considered." *Tulley v. Heyd*, 482 F. 2d 590, 592 (5th Cir., 1973). See also *Ingram v. Dunn*, 383 F. Supp. 1043, 1045 (Northern District, Georgia, 1974).

Accordingly, it is ORDERED that within fifteen (15) days of the entry of this Order the plaintiff submit to the Court any evidence she wishes the Court to consider under Rule 56, Federal Rules of Civil Procedure. Following the plaintiff's submission, the defendants shall have ten (10) days in which to respond. Should the plaintiff wish to reply to the defendants' response, she shall so inform the Court immediately upon receipt of the defendants' response.

ORDERED AND ENTERED this 14th day of November, 1975.

/s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT "D"

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MS. ETTA LEE KELLNER,	)	
Plaintiff	)	
VS.	)	CIVIL ACTION NO. SA-75-CA-187
KARNES CITY INDEPENDENT SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF TEXAS, ET AL	)	
Defendant	)	

AFFIDAVIT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

My name is JAMES A. McCLANE. I was a member of the Board of Trustees of the Karnes City Independent School District between the periods of March, 1975 and July, 1975, and on or about May, 1975 I participated in a decision made by the Board of Trustees of the Karnes City Independent School District to not renew the teaching contract between the Karnes City Independent School District and Ms. Etta Lee Kellner. I have personal knowledge of the facts set forth hereinbelow.

I was acting in the performance of my official duties as a member of the Board of Trustees of the Karnes City Indepen-

dent School District and undertook the same in good faith. There was no arbitrary action on my part, or to the best of my knowledge, on the part of any other individual member of the Board of Trustees of the Karnes City Independent School District in arriving at the decision to not renew the teaching contract of Ms. Etta Lee Kellner for the 1975-1976 school term. The decision to not renew the contract of Ms. Etta Lee Kellner for the 1975-76 school term was a conscientious decision on my part in which I independently exercised my judgment in a matter that I believed to be in the long-term interest of the School District and the students enrolled, and to be enrolled in the future, in the Karnes City Independent School District. There was no improper motivation or malicious [2] intent involved in arriving at the determination that Ms. Etta Lee Kellner should not be the recipient of a renewed contract with the Karnes City Independent School District.

The contract between Ms. Etta Lee Kellner and the Karnes City Independent School District was not renewed for good and valid reasons, including, among other things, the following:

1. Ms. Etta Lee Kellner exercised poor judgment in her capacity as a teacher in the following respects:

   (a) She exhibited hostility toward students.

   (b) She used unnecessary force in the administration of corporal punishment.

   (c) She violated administrative directives by frequently leaving the school campus during her conference periods.

2. She exhibited poor classroom management in the following respects:

   (a) She maintained poor classroom discipline.

   (b) She failed to prepare her lesson plans either for herself or substitute teachers.

   (c) She violated administrative directives by leaving the classroom unsupervised and by leaving the classroom frequently during normal class time.

3. She failed to maintain her grade book properly and to record grades on the report cards accurately.

4. She failed to perform her teaching duties in a manner which would meet the accepted standard of conduct for the profession as recognized and applied in similarly situated school districts throughout the State of Texas.

Furthermore, I, James A. McClane, on or about July 25, 1975, wrote a letter to Ms. Etta Lee Kellner, and placed the same in the United States Mails, notifying her of the foregoing reasons for the non-renewal of her contract for the 1975-76 [3] school year with the Karnes City Independent School District, and at that time offered her a hearing concerning the decision of the Board of Trustees of the Karnes City Independent School District to not offer her a contract for the 1975-76 school year. In said letter, I informed Ms. Kellner that certain individuals, named therein, would probably testify at the hearing concerning the above charges, and requested that Ms. Kellner advise the Board of Trustees, in writing, within fifteen (15) days from receipt of said letter if she desired to have a hearing concerning the Board's decision to not offer her a contract for the 1975-76 school year. Ms. Kellner has not made a response to said letter to date.

I hereby certify that to the best of my personal knowledge and upon my oath that I have read the foregoing statements

and believe the same to be true and valid.

/s/ James A. McClane
James A. McClane

STATE OF TEXAS)

COUNTY OF KARNES)

BEFORE ME, a Notary Public, on this day personally appeared JAMES McCLANE, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this 25th day of November, 1975.

/s/ Mary R. Ahrens
Notary Public in and for
Karnes County, Texas

EXHIBIT "E"

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MS. ETTA LEE KELLNER,)

Plaintiff)

VS.) CIVIL ACTION NO. SA-75-CA-187

KARNES CITY INDEPENDENT SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF TEXAS, ET AL)

Defendant)

AFFIDAVIT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

My name is MARVIN WITTE. I was a member of the Board of Trustees of the Karnes City Independent School District between the periods of March, 1975 and July, 1975, and on or about May, 1975 I participated in a decision made by the Board of Trustees of the Karnes City Independent School District to not renew the teaching contract between the Karnes City Independent School District and Ms. Etta Lee Kellner. I have personal knowledge of the facts set forth hereinbelow.

I was acting in the performance of my official duties as a member of the Board of Trustees of the Karnes City Indepen-

dent School District and undertook the same in good faith. There was no arbitrary action on my part, or to the best of my knowledge, on the part of any other individual member of the Board of Trustees of the Karnes City Independent School District in arriving at the decision to not renew the teaching contract of Ms. Etta Lee Kellner for the 1975-1976 school term. The decision to not renew the contract of Ms. Etta Lee Kellner for the 1975-76 school term was a conscientious decision on my part in which I independently exercised my judgment in a matter that I believed to be in the long-term interest of the School District and the students enrolled, and to be enrolled in the future, in the Karnes City Independent School District. There was no improper motivation or malicious [2] intent involved in arriving at the determination that Ms. Etta Lee Kellner should not be the recipient of a renewed contract with the Karnes City Independent School District.

The contract between Ms. Etta Lee Kellner and the Karnes City Independent School District was not renewed for good and valid reasons, including, among other things, the following:

1. Ms. Etta Lee Kellner exercised poor judgment in her capacity as a teacher in the following respects:

   (a) She exhibited hostility toward students.

   (b) She used unnecessary force in the administration of corporal punishment.

   (c) She violated administrative directives by frequently leaving the school campus during her conference periods.

2. She exhibited poor classroom management in the following respects:

   (a) She maintained poor classroom discipline.

   (b) She failed to prepare her lesson plans either for herself or substitute teachers.

   (c) She violated administrative directives by leaving the classroom unsupervised and by leaving the classroom frequently during normal class time.

3. She failed to maintain her grade book properly and to record grades on the report cards accurately.

4. She failed to perform her teaching duties in a manner which would meet the accepted standard of conduct for the profession as recognized and applied in similarly situated school districts throughout the State of Texas.

I hereby certify that to the best of my personal knowledge and upon my oath that I have read the foregoing statements and believe the same to be true and valid.

/s/ Marvin Witte

Marvin Witte

[3] STATE OF TEXAS)

COUNTY OF KARNES)

BEFORE ME, a Notary Public, on this day personally appeared MARVIN WITTE, known to me to be the person whose name is subscribed to the foregoing instrument and acknow-

ledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this 25th day of November, 1975.

/s/ Mary R. Ahrens
Notary Public in and for
Karnes County, Texas

[1] [1]

EXHIBIT "F"

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MS. ETTA LEE KELLNER,	)	
Plaintiff	)	
VS.	)	CIVIL ACTION NO. SA-75-CA-187
KARNES CITY INDEPENDENT SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF TEXAS, ET AL	)	
Defendant	)	

AFFIDAVIT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

My name is KENNETH MATTHEWS. I was a member of the Board of Trustees of the Karnes City Independent School District between the periods of March, 1975 and July, 1975, and on or about May, 1975 I participated in a decision made by the Board of Trustees of the Karnes City Independent School District to not renew the teaching contract between the Karnes City Independent School District and Ms. Etta Lee Kellner. I have personal knowledge of the facts set forth hereinbelow.

I was acting in the performance of my official duties as a member of the Board of Trustees of the Karnes City Indepen-

dent School District and undertook the same in good faith. There was no arbitrary action on my part, or to the best of my knowledge, on the part of any other individual member of the Board of Trustees of the Karnes City Independent School District in arriving at the decision to not renew the teaching contract of Ms. Etta Lee Kellner for the 1975-1976 school term. The decision to not renew the contract of Ms. Etta Lee Kellner for the 1975-76 school term was a conscientious decision on my part in which I independently exercised my judgment in a matter that I believed to be in the long-term interest of the School District and the students enrolled, and to be enrolled in the future, in the Karnes City Independent School District. There was no improper motivation or malicious [2] intent involved in arriving at the determination that Ms. Etta Lee Kellner should not be the recipient of a renewed contract with the Karnes City Independent School District.

The contract between Ms. Etta Lee Kellner and the Karnes City Independent School District was not renewed for good and valid reasons, including, among other things, the following:

1. Ms. Etta Lee Kellner exercised poor judgment in her capacity as a teacher in the following respects:

   (a) She exhibited hostility toward students.

   (b) She used unnecessary force in the administration of corporal punishment.

   (c) She violated administrative directives by frequently leaving the school campus during her conference periods.

2. She exhibited poor classroom management in the following respects:

   (a) She maintained poor classroom discipline.

   (b) She failed to prepare her lesson plans either for herself or substitute teachers.

   (c) She violated administrative directives by leaving the classroom unsupervised and by leaving the classroom frequently during normal class time.

3. She failed to maintain her grade book properly and to record grades on the report cards accurately.

4. She failed to perform her teaching duties in a manner which would meet the accepted standard of conduct for the profession as recognized and applied in similarly situated school districts throughout the State of Texas.

I hereby certify that to the best of my personal knowledge and upon my oath that I have read the foregoing statements and believe the same to be true and valid.

/s/ Kenneth Matthews
Kenneth Matthews

[3] STATE OF TEXAS)

COUNTY OF KARNES)

BEFORE ME, a Notary Public, on this day personally appeared KENNETH MATTHEWS, known to me to be the person whose name is subscribed to the foregoing instrument and

acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this 26 day of November, 1975.

/s/ Mary R. Ahrens
Notary Public in and for
Karnes County, Texas

EXHIBIT "G"

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MS. ETTA LEE KELLNER, Plaintiff	)	
VS.	)	CIVIL ACTION NO. SA-75-CA-187
KARNES CITY INDEPENDENT SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF TEXAS, ET AL	)	
Defendant	)	

AFFIDAVIT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

My name is ALOIS LINHART. I was a member of the Board of Trustees of the Karnes City Independent School District between the periods of March, 1975 and July, 1975, and on or about May, 1975 I participated in a decision made by the Board of Trustees of the Karnes City Independent School District to not renew the teaching contract between the Karnes City Independent School District and Ms. Etta Lee Kellner. I have personal knowledge of the facts set forth hereinbelow.

I was acting in the performance of my official duties as a member of the Board of Trustees of the Karnes City Indepen-

[1] [2]

dent School District and undertook the same in good faith. There was no arbitrary action on my part, or to the best of my knowledge, on the part of any other individual member of the Board of Trustees of the Karnes City Independent School District in arriving at the decision to not renew the teaching contract of Ms. Etta Lee Kellner for the 1975-1976 school term. The decision to not renew the contract of Ms. Etta Lee Kellner for the 1975-76 school term was a conscientious decision on my part in which I independently exercised my judgment in a matter that I believed to be in the long-term interest of the School District and the students enrolled, and to be enrolled in the future, in the Karnes City Independent [2] School District. There was no improper motivation or malicious intent involved in arriving at the determination that Ms. Etta Lee Kellner should not be the recipient of a renewed contract with the Karnes City Independent School District.

The contract between Ms. Etta Lee Kellner and the Karnes City Independent School District was not renewed for good and valid reasons, including, among other things, the following:

1. Ms. Etta Lee Kellner exercised poor judgment in her capacity as a teacher in the following respects:

   (a) She exhibited hostility toward students.

   (b) She used unnecessary force in the administration of corporal punishment.

   (c) She violated administrative directives by frequently leaving the school campus during her conference periods.

2. She exhibited poor classroom management in the following respects:

[2] [3]

   (a) She maintained poor classroom discipline.

   (b) She failed to prepare her lesson plans either for herself or substitute teachers.

   (c) She violated administrative directives by leaving the classroom unsupervised and by leaving the classroom frequently during normal class time.

3. She failed to maintain her grade book properly and to record grades on the report cards accurately.

4. She failed to perform her teaching duties in a manner which would meet the accepted standard of conduct for the profession as recognized and applied in similarly situated school districts throughout the State of Texas.

I hereby certify that to the best of my personal knowledge and upon my oath that I have read the foregoing statements and believe the same to be true and valid.

/s/ Alois Linhart
Alois Linhart

[3] STATE OF TEXAS)

COUNTY OF KARNES)

BEFORE ME, a Notary Public, on this day personally appeared ALOIS LINHART, known to me to be the person whose name is subscribed to the foregoing instrument and

acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this 26 day of November, 1975.

/s/ Mary R. Ahrens
Notary Public in and for
Karnes County, Texas

EXHIBIT "H"

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MS. ETTA LEE KELLNER,	)	
Plaintiff	)	
VS.	)	CIVIL ACTION NO. SA-75-CA-187
KARNES CITY INDEPENDENT SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF TEXAS, ET AL	)	
Defendant	)	

AFFIDAVIT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

My name is HILMER WAGENER. I was a member of the Board of Trustees of the Karnes City Independent School District between the periods of March, 1975 and July, 1975, and on or about May, 1975 I participated in a decision made by the Board of Trustees of the Karnes City Independent School District to not renew the teaching contract between the Karnes City Independent School District and Ms. Etta Lee Kellner. I have personal knowledge of the facts set forth hereinbelow.

I was acting in the performance of my official duties as a member of the Board of Trustees of the Karnes City Indepen-

dent School District and undertook the same in good faith. There was no arbitrary action on my part, or to the best of my knowledge, on the part of any other individual member of the Board of Trustees of the Karnes City Independent School District in arriving at the decision to not renew the teaching contract of Ms. Etta Lee Kellner for the 1975-1976 school term. The decision to not renew the contract of Ms. Etta Lee Kellner for the 1975-76 school term was a conscientious decision on my part in which I independently exercised my judgment in a matter that I believed to be in the long-term interest of the School District and the students enrolled, and to be enrolled in the future, in the Karnes City Independent School District. There was no improper motivation or malicious [2] intent involved in arriving at the determination that Ms. Etta Lee Kellner should not be the recipient of a renewed contract with the Karnes City Independent School District.

The contract between Ms. Etta Lee Kellner and the Karnes City Independent School District was not renewed for good and valid reasons, including, among other things, the following:

1. Ms. Etta Lee Kellner exercised poor judgment in her capacity as a teacher in the following respects:

   (a) She exhibited hostility toward students.

   (b) She used unnecessary force in the administration of corporal punishment.

   (c) She violated administrative directives by frequently leaving the school campus during her conference periods.

2. She exhibited poor classroom management in the following respects:

   (a) She maintained poor classroom discipline.

   (b) She failed to prepare her lesson plans either for herself or substitute teachers.

   (c) She violated administrative directives by leaving the classroom unsupervised and by leaving the classroom frequently during normal class time.

3. She failed to maintain her grade book properly and to record grades on the report cards accurately.

4. She failed to perform her teaching duties in a manner which would meet the accepted standard of conduct for the profession as recognized and applied in similarly situated school districts throughout the State of Texas.

I hereby certify that to the best of my personal knowledge and upon my oath that I have read the foregoing statements and believe the same to be true and valid.

/s/ Hilmer Wagener
Hilmer Wagener

[3] STATE OF TEXAS)

COUNTY OF KARNES)

BEFORE ME, a Notary Public, on this day personally appeared HILMER WAGENER, known to me to be the person whose name is subscribed to the foregoing instrument and

acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this 26 day of November, 1975.

/s/ Mary R. Ahrens
Notary Public in and for
Karnes County, Texas

EXHIBIT "I"

March 13, 1975

Mrs. Etta Lee Kellner
City Elementary School
Karnes City, TX.

Dear Mrs. Kellner:

At the Board of Trustees meeting of March 10, 1975, it was the school board's decision to delay action on your teacher contract for 1975-76 until the June 1975 meeting.

The reason the Board made this decision was because of the evaluation presented by the administrative staff.

In 1974-75, your yearly evaluation indicated that of 37 items you rated commendable on 12 and acceptable on 25. This was among the lowest rating of any faculty member retained on the staff.

This year your rating on the same 37 items indicates 5 commendable items, 26 acceptable items, and 6 needs improvement items; quite a deterioration compared with the previous evaluation which was not good to begin with.

Therefore, the Board will delay its consideration of your employment for 1975-76 until this school year is completed.

Sincerely,

/s/ M. E. Asman

M. E. Asman
Superintendent
Karnes City ISD

MEA:mlj

EXHIBIT "J"

TEACHER EVALUATION

Please grade each item 1 to 5:

1. Superior
2. Commendable
3. Acceptable
4. Needs Improvement
5. Unsatisfactory

NA - Not Applicable

A. Professional Personal Qualities

(Rating)

3 1. Alertness.
3 2. Enthusiasm.
2 3. Initiative and industry.
2 4. Positive attitude.
3 5. Tact, diplomacy and courtesy.
2 6. Self-confidence.
3 7. Emotional stability.
3 8. Sense of humor.
3 9. Punctuality and good attendance record.
2 10. Good voice quality and diction.
3 11. Adequate physical vitality.
2 12. Appropriate dress and grooming.
3 13. Ability to adjust to new programs and ideas.
3 14. Good judgment.
3 15. Cheerfulness.

B. Professional Performance

2 1. Gives evidence of knowledge of subject matter.
2 2. Gives evidence of ability to teach the subject.
3 3. Develops effective plans.

3 4. Demonstrates effective use of class time.
5 5. Uses effectively available resources, teacher aids and consultative services.
2 6. Recognizes individual differences.
2 7. Motivates pupils.
2 8. Understands and likes children.
5 9. Maintains effective class management.
3 10. Gives attention to health and safety.
3 11. Maintains a room conducive to learning.
2 12. Uses supplies and equipment economically.
3 13. Uses variety and creativeness in the instructional program.

C. Professional Responsibility

3 1. Adheres to the Code of Ethics and Standard Practices of the Teaching Profession.
3 2. Adheres to district policies and procedures.
3 3. Promotes good school community and parent relationships.
3 4. Relates well to the total staff, and shares materials and experiences.
3 5. Maintains professional involvement and improvement.
3 6. Is accurate and prompt in attention to records and reports.
3 7. Performs routine duties in a professional manner.
3 8. Is willing to try new ideas.
2 9. Is receptive to constructive criticism.

Comments:

Teacher . Room No. 9 is not adequate for teaching Art; therefore I asked to be moved to room No. 6. This room needs more shelf space.

Evaluator . Recommend continuance in present position.

(List suggestions for improvement)

/s/ D. R. Luthringer
Evaluator's signature

/s/ Mrs. Etta Lee Kellner
Teacher's Signature

Karnes City Elem.
School

Art - grades 3 - 4 - 5
Teaching Assignment (Gr. or Sub.)

2 - 19 - 74
Date

2 - 19 - 74
Date

25
Years Experience

EXHIBIT "K"

TEACHER EVALUATION

Please grade each item 1 to 5:

1. Superior
2. Commendable
3. Acceptable
4. Needs Improvement
5. Unsatisfactory

NA - Not Applicable

A. Professional Personal Qualities

(Rating)

3 1. Alertness.
3 2. Enthusiasm.
3 3. Initiative and industry.
3 4. Positive attitude.
3 5. Tact, diplomacy and courtesy.
3 6. Self-confidence.
3 7. Emotional stability.
3 8. Sense of humor.
3 9. Punctuality and good attendance record.
3 10. Good voice quality and diction.
3 11. Adequate physical vitality.
4 12. Appropriate dress and grooming.
3 13. Ability to adjust to new programs and ideas.
4 14. Good judgment.
3 15. Cheerfulness.

B. Professional Performance

3 1. Gives evidence of knowledge of subject matter.
3 2. Gives evidence of ability to teach the subject.
3 3. Develops effective plans.

4 4. Demonstrates effective use of class time.
3 5. Uses effectively available resources, teacher aids and consultative services.
3 6. Recognizes individual differences.
3 7. Motivates pupils.
3 8. Understands and likes children.
4 9. Maintains effective class management.
3 10. Gives attention to health and safety.
4 11. Maintains a room conducive to learning.
2 12. Uses supplies and equipment economically.
3 13. Uses variety and creativeness in the instructional program.

Teacher Evaluation (Continued)

C. Professional Responsibility

2 1. Adheres to the Code of Ethics and Standard Practices of the Teaching Profession.
2 2. Adheres to district policies and procedures.
3 3. Promotes good school community and parent relationships.
4 4. Relates well to the total staff, and shares materials and experiences.
3 5. Maintains professional involvement and improvement.
4 6. Is accurate and prompt in attention to records and reports.
3 7. Performs routine duties in a professional manner.
3 8. Is willing to try new ideas.
3 9. Is receptive to constructive criticism.

Comments:
Teacher Frequently due to faulty construction of Grade Book

Evaluator Recommend renewal of contract with reservations

(List suggestions for improvement)

/s/ D. R. Luthringer
Evaluator's signature

/s/ Mrs. Etta Lee Kellner
Teacher's Signature

City Elem.
School

Fourth Grade
Teaching Assignment (Gr. or Sub.)

1 - 30 - 75
Date

1 - 30 - 75
Date

26 yrs.
Years Experience

EXHIBIT "L"

KARNES CITY INDEPENDENT SCHOOL DISTRICT
TEACHER'S CONTRACT

DATE March 18, 1974

Mrs. Etta Kellner

You have been elected to teach in the Karnes City Independent School District during the 1974 - 1975 school year for the annual sum of state salary $11,380. plus $288 to be paid in twelve equal installments, subject to the following conditions: that you meet the qualification requirements of the Texas Education Agency and the standards of accreditation; that you comply with the policies of the Board of Trustees of the Karnes City Independent School District; that you are subject to assignments or re-assignment by the Superintendent of Schools. Teachers will be consulted as soon as possible of any change of assignment made after teacher signs his contract. Teacher will have 10 days to accept change of assignment or reject the contract. Every effort will be made to complete these changes of assignment by July 1st.

You further agree to teach to the best of your skill and ability and to be governed by and discharge the duties required by the laws of this State and such rules and regulations as may be made by the Board of Trustees, the superintendent, and/or the Principal of your school.

SPECIAL CONDITIONS: _____

_____

_____

This contract will be effective for 1 year (s) as long as you do efficient work and retain a good moral character. It is agreed that you will not ask for a release in order to accept work elsewhere after July 1, 1974.

To validate this contract, please sign and return the original copy to the Superintendent's office, Karnes City Independent School District, within ten (10) days. (If extension of time is needed, contact the Superintendent.)

/s/ M. E. Asman
M. E. Asman, Superintendent

Accepted: /s/ Mrs. Etta Kellner
Teacher

[1] [1]

EXHIBIT "M"

[1] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MS. ETTA LEE KELLNER	)	
	)	
V.	)	SA-75-CA-187
	)	
KARNES CITY INDEPENDENT	)	
SCHOOL DISTRICT, ET AL.	)	

ORDER

FILED: February 12, 1976

On this the 11th day of February, 1976, came on to be considered the Motion to Dismiss for Failure to State a Claim filed by the defendants in the above styled and numbered cause pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure. The Order of this Court entered on November 14, 1975 converted this Motion under Rule 12 into a plea for Summary Judgment and set out time lines for the parties to submit to the Court any and all evidence which they wished the Court to consider under Rule 56, Federal Rules of Civil Procedure. The Court finds that these time lines are long since past and that all parties have had ample opportunity in which to submit their evidence in anticipation of a Rule 56 ruling.

The Court has reviewed the briefs, exhibits and pleadings of the parties together with the complete record and file of the case and is of the opinion and so finds that the Motion is meritorious and should be granted.

[1] [2]

During the 1974-1975 school year the plaintiff was employed as a teacher by the Karnes City Independent School District. In the spring of 1975, the plaintiff was informed that the Superintendent of Schools had recommended that her one year contract not be renewed. After two meetings with the Board of Trustees, the Board voted not to renew the plaintiff's [2] contract allegedly on the grounds, among others, that she exercised poor judgment and poor class management. (Plaintiff's Complaint, page 3)

Plaintiff subsequently filed this action alleging violations of her rights by the defendants under 42 U.S.C., Sec. 1983, and the First and Fourteenth Amendments to the United States Constitution. Jurisdiction arises under 28 U.S.C., Sec. 1331.1/

Although jurisdiction does exist under 28 U.S.C., Sec. 1331, this Court is of the opinion that the provisions of 42 U.S.C., Sec. 1983, giving plaintiff a remedy do not apply to all the defendants named in this action. The authority that a School District is not a "person" within the meaning of Section 1983 is overwhelming. *City of Kenosh v. Bruno*, 412 U.S. 507, 513-514; *Ingram v. Wright*, Slip Opinion 73-2078 (Jan. 8, 1976) (en banc). It is clear, therefore, that the defendant, Karnes City Independent School District, is not a person subject to Sec. 1983 and it is hereby ORDERED that the Karnes City Independent School District be, and it is hereby, dismissed as a party in this case because of the lack of subject matter jurisdiction.

Furthermore, it is uncontroverted from the pleadings and the exhibits that the only involvement of the defendant, Mrs. Mary Ahrens, with the determination of the School Board to

---

1/ Recognizing that diversity does not exist in this action, plaintiff has dropped her claim that jurisdiction arises under 28 U.S.C., Sec. 1332.

[2] [3]

not offer plaintiff a contract for the 1975-1976 school year was that of a recording secretary to the Board and, as such, she did not participate or contribute in any way to the Board's determination. Obviously, she had no active role in the alleged deprivation of the plaintiff's rights and it is, therefore, [3] ORDERED that the defendant, Mrs. Mary Ahrens, be dismissed from this cause as the plaintiff's complaint fails to state a claim against her upon which relief can be granted.

With regard to Messrs. Luthringer and Asman; the Court finds that even though they did not actively participate in the vote of the School Board their input into the teacher election process through recommendations to the Board would demand that they be held to the same degree of accountability as the individual members of the Board. (See Section IV G of the Policies and Regulations of the Board of Trustees of the Karnes City Independent School District requiring the recommendation of both the principal and superintendent before a teacher may be re-elected by the Board.) Therefore, the Motion to Dismiss as to them is DENIED.

In proceeding to a determination of the case under Rule 56, the hereinabove dismissed defendants are included in the Court's consideration and any ruling under Rule 56 shall apply to them as well.

The initial claim of the plaintiff is that she has acquired a "property" interest in her continued employment and that this expectation goes beyond the mere subjective. In failing to renew her year to year contract, it is argued that the Board of Trustees has abrogated this "property" interest and violated the plaintiff's rights to procedural due process.

Plaintiff concedes, and the contract she accepted clearly demonstrates, that she had no formal tenure such as would entitle her to continued employment in the absence of suffi-

[3] [4]

cient cause.

> [4] "Thus the terms of the [plaintiff's] appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the [plaintiff] surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (Emphasis in the original)

Realizing that a subjective expectation of continued employment would be an insufficient property interest to invoke the protections of the Fourteenth Amendment, the plaintiff has alleged that "pursuant to the rules and policies practiced and promulgated by the defendant district . . . all teachers in that district can expect to be renewed for employment absent a showing of good and sufficient cause." (Plaintiff's Complaint, page 3.) This allegation coincidentally recognizes the holding in *Perry v. Sindermann*, 408 U.S. 593 (1972), in which the Supreme Court held that even in the absence of formal tenure, a teacher *might* be able to establish a property interest in re-employment cognizable under the Fourteenth Amendment.

> "A teacher, like the [plaintiff], who has held his position for a number of years, might be able to show from the circumstances of this service - and from other relevant facts - that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a 'common law of a particular

[4] [5]

> industry or of a particular plant' that may supplement a collective-bargaining agreement, Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 579, so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." 408 U.S. at 603.

Superficially, therefore, plaintiff would seem to have alleged a claim sufficient to survive a Motion to Dismiss under Rule 12 (b) (6).

The difficulty is that even "proof of such a property interest would not . . . entitle [the plaintiff] to reinstatement. But such proof would obligate college officials to grant a [5] hearing at [plaintiff's] request, where [plaintiff] could be informed of the grounds for . . . nonretention and challenge their sufficiency." *Perry*, supra, at 603. Plaintiff, however, in the case at hand, has failed to even allege that she has ever been denied such a hearing or that she wants one. 2/ Rather, the plaintiff demands immediate reinstatement, a form of relief the Court could not provide *even if the allegations of the Complaint were proven.* It follows that the plaintiff has failed to state a claim upon which relief can be granted. *VanDe Vate v. Boling and the University of Tennessee*, 379 F. Supp. 925, 929 (D.C. Tenn. 1974); *Jones v. Hopper*, 410 F. 2d 1323 (10th Cir., 1969); *Orr v. Trinter*, 444 F. 2d 128 (6th Cir., 1971). It is elemental that before a plaintiff can succeed he must establish a prima facie case of discrimination on impermissible grounds. The plaintiff has failed to do so in the case at hand.

2/ According to the uncontroverted evidence submitted by defendants, it is uncontested that plaintiff has as yet failed to accept an offer of the Board for a further hearing with regard to the non-renewal of her contract.

[5] [6]

As is the case with "property" interests, the meaning of "liberty" under the Fourteenth Amendment has not infrequently been elusive. The word has been molded and shaped in an increasing number of judicial opinions. however, to the point where it has a recognizable meaning under the law.

Plaintiff has alleged that a favorable reputation is such a liberty protected by the Fourteenth Amendment and that the defendants have wrongly deprived her of such a reputation by terminating her employment and for other unnamed "constitutionally impermissible reasons". (Plaintiff's Complaint, page 4) It is true that the Courts have recognized that one's reputation can, [6] in certain circumstances, be a "liberty" subject to the full protection of due process. See *Roth*, supra. But the standard which the Court must apply in determining whether one has been deprived of this liberty is the degree to which one's reputation has been damaged. Stated in the negative, in an instance where the Court found no deprivation of liberty, the Supreme Court has concluded:

> "There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.
>
> "The State, in declining to rehire the [plaintiff], did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of *dishonesty, or immorality.* Had it done so, this would be a different case." *Roth*, supra, at 573.

Like Roth, the plaintiff has, as a matter of law, failed to demonstrate any damage to her reputation beyond the fact that her contract was not renewed.

[6] [7]

The only facts alleged in support of the alleged deprivation of the "liberty" are some of the reasons stated by the Board of Trustees in support of their decision not to renew the plaintiff's contract, namely "poor judgment" and "poor class management". These alleged aspersions on the plaintiff's ability or performance as a teacher are no more injurious to the plaintiff's reputation than the fact of non-renewal itself and clearly do not amount to a deprivation of liberty within the meaning of the Fourteenth Amendment, but rather are direct indications that the Board's decision not to renew the contract was based on good cause and not malevolence or caprice. The veracity of the Board's reasoning has not been questioned by the plaintiff or in any way brought into issue in this case and [7] on the face of the allegations alone the Court finds that good cause does exist for not renewing the plaintiff's contract.

While the Complaint also states that the "action is brought pursuant to the . . . First Amendment . . . " (Plaintiff's Complaint, page 1) no facts or cause of action are advanced in support of this statement.

For the reasons heretofore stated, the Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, as altered by the Court's Order of November 14, 1975 converting it into a Motion for Summary Judgment, is hereby in all things GRANTED and Judgment is entered with costs for the defendants, Karnes City Independent School District, M. E. Asman, D. R. Luthringer, James McClane, Mary Ahrens, Marvin Witte, Alois Linhart, Hilmer Wagener and Kenneth Matthews.

ORDERED AND ENTERED this 11th day of February, 1976.

/s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

[42] [42]

EXHIBIT "N"

[42] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MS. ETTA LEE KELLNER	)	
Plaintiff	)	
VS.	)	CIVIL ACTION NO. SA-75-CA-187
KARNES CITY INDEPENDENT SCHOOL DISTRICT, ET AL	)	
Defendants	)	

ORDER

FILED: March 2, 1976

On this 21st day of March, 1976, came on for consideration the plaintiff's motion to submit copies of the transcripts of two school board hearings held prior to the filing of the above-styled and numbered cause.

It appearing to the Court that said motion is unmeritorious and that good cause is not stated therefore, and further that the plaintiff has waived the right to submit any further evidence in regard to the defendants' motion for summary judgment, which was granted by this Court by Order dated February 11, 1976, the same is hereby, in all things, DENIED.

ENTERED on this the 21st day of March, 1976, at San Antonio, Texas.

/s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT "O"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-2131

Summary Calendar *

MS. ETTA LEE KELLNER,

Plaintiff-Appellant,

versus

KARNES CITY INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

Appeal From the United States District Court
for the Western District of Texas

(October 6, 1976)

Before GODBOLD, DYER and HILL, Circuit Judges.

PER CURIAM:

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

After careful and exhaustive review of the record and of the contentions of the parties, we AFFIRM on the basis of the memorandum opinion and order of the trial court filed February 12, 1976.

AFFIRMED.

EXHIBIT "P"

Rule 56.

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on [116] personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judg-

ment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

1963 Amendment

Inserted the words "answers to interrogatories" in the second sentence of subdivision (c).

Added to subdivision (e) the last two sentences relating to motion for summary judgment.

Complete Judicial Constructions, see Title 28, U.S.C.A.